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In the Supreme Court of the United States

OCTOBER TERM, 1968.

No. 158.

BROTHERHOOD OF RAILROAD TRAINMEN,
an unincorporated association, *et al.*,
Petitioners,

vs.

JOHN P. O'CONNELL, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT.

BRIEF OF BROTHERHOOD OF LOCOMOTIVE ENGINEERS AS AMICUS CURIAE.

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By consent of the petitioners and respondents, the Brotherhood of Locomotive Engineers files this brief as *amicus curiae.**

INTEREST OF AMICUS CURIAE.

This case is a companion to *Dirks v. Birkholz,* No. 172 (October Term, 1968). The major issue in both cases is: Does section 2, Eleventh (c) of the Railway Labor Act confer a right upon a railroad employee in the operating crafts, who is covered by a union shop agreement requiring membership in a union certified as the exclusive bargain-

* The consents were mailed to the Clerk of this Court on November 18, 1968.

ing representative of all the carrier's employees in several interrelated crafts, to satisfy the membership requirement therein by belonging to a union which is not an authorized representative of any of the carrier's employees?

The Brotherhood of Locomotive Engineers ("BLE") has filed a brief *amicus curiae* in *Dirks, supra*, setting forth in detail its interest and argument in support of the petitioner's position. In the interest of brevity, BLE respectfully requests that its brief therein be referred to as a more exhaustive reference.

As bargaining representative for the craft of locomotive engineers on most of the nation's major railroads and the selector of one representative on the First Division, National Railroad Adjustment Board, the issue involved is of vital concern to BLE. In several instances, BLE has negotiated union security agreements which provide, as does the agreement herein, that employees regularly assigned and working in the crafts represented by BLE, who do not exercise employment rights in a craft represented by another union, must as a condition of continued employment belong to BLE.

On the Richmond, Fredericksburg and Potomac Railroad, BLE is the certified representative of all engine service employees, *i.e.*, engineers and firemen collectively. BLE obtained an agreement requiring them to become and remain members of BLE. Subsequently, the Brotherhood of Locomotive Firemen and Enginemen, a union without bargaining rights on that property, filed suit to prevent its enforcement on the basis that the agreement violated the Railway Labor Act insofar as membership in that union would not satisfy the membership obligations contained therein. In a memorandum opinion, the United States District Court for the Eastern District of Virginia declared the agreement invalid. *Carter, et al. v. Richmond, Fredericks-*

burg and Potomac R. Co. et al., Civil Action No. 4398 (Sept. 12, 1968). A final appealable order has not yet been entered. As soon as that is accomplished, BLE intends to appeal on the same issue presented herein.

Further, BLE has an interest in this litigation, for it believes the underlying rationale would appear to restrict the exclusive authority of the bargaining representative selected by the majority of employees in favor of encouraging representation by rival minority unions, thereby stimulating disorder and instability on union matters among employees in the railroad operating crafts.

ARGUMENT.

The sole purpose of the alternative union membership provision of Section 2 Eleventh (c)—to protect employees subject to temporary intercraft transfers from having to belong to more than one of the organizations holding union security agreements for those crafts—does not arise when one union is the bargaining representative for all of the interrelated crafts.

Both the decisions rendered below in this case and in the companion case of *Birkholz v. Dirks*, 391 F. 2d 289 (7th Cir. 1968), are necessarily founded on a theory that Congress adopted a scheme of fostering minority union enclaves in the railroad operating crafts to be achieved by permitting any employee in those crafts to belong to any of the five unions having a representative on the First Division of the National Railroad Adjustment Board. Under this philosophy, it is considered appropriate to carve out a different principle applicable to satisfaction of the union shop obligations in these five railroad crafts than governs industries within the purview of the Labor-Management Relations Act and the non-operating crafts in the railroad industry. Not only does this policy conflict with the limited

purpose of Section 2, Eleventh (c) of the Railway Labor Act [45 U.S.C. 152, Eleventh (c)], it also contravenes the general purposes of the Act by serving to usurp the role of the collective bargaining representative.

In justification of this approach, the court below found, without any basis therefor, that Congress intended to implement the aforementioned scheme through the means of reciprocal gains and losses among the various operating unions. See *O'Connell v. Erie Lackawanna R. Co.*, 391 F. 2d 156, 163 (2d Cir. 1968). This contention fails to adequately answer the question as to why the draftsmen would have intended that an engineer should be able to satisfy the requirements of a BLE union shop by belonging to the Switchmen's Union or the reasoning behind any of the other combinations of unions and employees that could be reached. It is apparent that Congress did not want to achieve the results required by this line of reasoning.

In this regard, this Court has clearly held that "the only purpose of Section 2, Eleventh (c) was a very narrow one—to prevent compulsory dual unionism or the necessity of changing from one union to another when an employee temporarily changes crafts." *Pennsylvania Railroad Co. v. Rychlik*, 352 U.S. 480, 492 (1957). This specific point was later emphasized when the Court said that the section was not "intended to provide employees with a general right to join unions other than the designated bargaining representative of their craft, except to meet the narrow problem of intercraft mobility." *Id.* at 493. Rather than following the unequivocal language of this Court's opinion therein, the Court of Appeals felt compelled to follow its own decision in *Rychlik v. Pennsylvania Railroad Co.*, 229 F. 2d 171 (2d Cir. 1956). See *O'Connell v. Erie Lackawanna R. Co., supra*, 162 (2d Cir. 1968). How-

ever, it is submitted the definitive statements of this Court are not obiter dictum to be totally disregarded.

The interpretation below of Section 2, Eleventh (c) goes far beyond the limited purpose expressed in its legislative history as authoritatively found by this Court.

In part, the opinion below attempted to buttress the aforementioned theory by asserting that the decision issued subsequent to the *Rychlik* case in *Felter v. Southern Pacific Co.*, 359 U.S. 326 (1959) implied that an employee can satisfy the union shop requirements by membership in any of the five qualified unions. This finding was accomplished by surmising that "the Court assumed that Felter had validly changed his union membership although it was clear he left the union which was his collective bargaining agent and it was not clear that his new union represented any of the railroad employees." *O'Connell v. Erie Lackawanna R. Co., supra*, 163. The basic error in this reasoning stems from overlooking this Court's emphasis in *Felter, supra*, at 336-337, that the narrow area left open for solicitation by rival organizations is "where no union shop has been established, or within the area where even a worker under a union-shop arrangement can change affiliations" as described in the intercraft mobility sections of the *Rychlik* opinion.

In addition, review of the lower court opinions in *Felter* establishes that the petitioner therein was employed as a conductor for which craft the Order of Railway Conductors and Brakemen rather than the respondent Brotherhood of Railroad Trainmen was the bargaining representative on the Southern Pacific. 256 F. 2d 429 (9th Cir. 1958), affirming 155 F. Supp. 315 (N.D. Cal. 1957). Thus, contrary to the assumptions of the lower court herein, the employee attempting to revoke a checkoff authorization to the Trainmen's organization in that case was a

conductor for which the union he desired to belong, Order of Railway Conductors and Brakemen, was the authorized bargaining representative.[1] It is, therefore clear that Felter's new union did represent a craft of the railroad's employees, the craft in which he was actually working. Definitely, the question herein was not reached in that case. On the above basis, it could even be validly assumed that the ultimate decision sustains petitioners' contention in regard to the issue now presented.

In summary, application of the "disarmingly clear" language of the section under the rationale exercised below exceeds the very narrow problem contemplated by Section 2, Eleventh (c) by going beyond the problem of employees faced with the dilemma of intercraft mobility. Only where the employee is confronted with compulsory dual unionism and jeopardy to his employment rights by shuttling back and forth between crafts represented by different unions holding union shop agreements does the section contemplate any relief from the obligations of membership in the bargaining representative of the craft in which he is temporarily transferred. This situation cannot arise where, as here, one union represents all engine or train service employees on a railroad; nor where the employee does not shuttle back and forth between crafts; nor where, as here, the union to which the employee may wish to belong is not the bargaining representative for any interrelated craft of employees on the involved rail carrier. In short, Section 2, Eleventh (c) should not be applied to a problem that does not exist in the given factual setting.

On the other hand, the decision below tends to fragmentize representation and collective bargaining in the

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[1] See also Twenty-First Annual Report of the National Mediation Board (1956), Table 12A, fol. p. 74.

railroad operating crafts. It simply fosters minority union enclaves, and as a result, is diametrically opposed to the most basic and specific purpose of union shop agreements —to strengthen the role of the collective bargaining representative. In the instant situation, the choice of a majority of all train service employees pertaining to the certified representative for all employees in those crafts is totally disregarded. Its ability to function in that capacity is unnecessarily weakened without any plausible ground for doing so.

CONCLUSION.

For the above reasons, it is submitted that the union shop agreement herein is valid and lawful under the provisions of the Railway Labor Act. The decision below should be accordingly reversed.

Respectfully submitted,

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